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721853—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 619

GRANDVIEW DAIRY, INC., PETITIONER

v.

MARVIN JONES, WAR FOOD ADMINISTRATOR, AND CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on petitioner's complaint (R. 118–122) is reported in 61 F. Supp. 460, and the opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 133–141) is reported in 157 F. 2d 5.

JURISDICTION

The judgment of the court below was entered on July 17, 1946 (R. 141). The petition for a writ of certiorari was filed October 17, 1946. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether the finding of the War Food Administrator that the unitary, integrated operations conducted by petitioner at Webster Crossing made the enterprise one plant is a permissible interpretation of Section 927.7 (f) of the milk-marketing order under which petitioner was operating, and whether this finding is supported by substantial evidence.

2. Whether a contrary ruling by the Assistant Secretary of Agriculture in a prior administrative proceeding brought by petitioner covering a different period of time was *res judicata* of the issues in the present proceeding.

STATUTE AND ORDER INVOLVED

The Milk Order which is involved was issued by the Secretary of Agriculture pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601, 608c. The Order is known as Federal Milk Order No. 27—New York Metropolitan Marketing Area. It was originally issued on August 5, 1938 (3 F. R. 1945), and was reissued with amendments March 1, 1940, effective May 1, 1940 (5 F. R. 1258, 1585). Section 927.7 (f) of this Order (R. 99) provides:

> *Market service payments.* Any handler may make claims, on forms applied by the

market administrator, for payments out of the producer-settlement fund under the conditions set forth in this paragraph with respect to milk received from producers at a plant equipped only for the receiving and shipping of milk to the marketing area which was moved to a second plant outside of the marketing area and there separated into cream and skim milk or manufactured. The market administrator shall, after preliminary audit of such claim to check the actual movement of the milk and the proper classification thereof, make payment to such handler, subject to final audit, out of the producer-settlement fund, or issue credit against balances due by such handler to the producer-settlement fund, at the following rates and under the following conditions:

* * * * *

STATEMENT

Petitioner is a handler of fluid milk and milk products which it ships to the New York Metropolitan Marketing Area. Pursuant to Section 927.7 (f) of the Order, petitioner made claims to the Market Administrator for the period August 1940 to February 1941, inclusive, for market service payments with respect to milk which petitioner received from producers at its Building No. 1 at Webster Crossing, New York, and moved by pipeline to its Building No. 2 approximately 50 feet away, where it was manufactured or separated into cream and skim milk (R. 81). The contention was that the two buildings were to be

treated as separate plants for purposes of the payments under Section 927.7 (f). The Market Administrator denied these claims (R. 78).

As authorized by Section 8c (15) (A) of the Act, petitioner filed with the Secretary of Agriculture a petition for a review of the ruling of the Market Administrator. The Assistant to the War Food Administrator, after a hearing, found that the unitary, integrated operations of petitioner at Webster Crossing made the enterprise one plant and approved denial of petitioner's claims (R. 116, 117).[1] Respecting the operations at Webster Crossing he made the following findings of fact:

During the period covered by the claims petitioner owned two buildings at Webster Crossing, one of which was referred to as Building No. 1 and the other as Building No. 2. Building No. 1 was not equipped for separation or manufacture of milk but was equipped for receiving milk and shipping it to the marketing area, and for moving it by pipe-line to Building No. 2 by pumping it through a removable, sanitary, pipe-line connecting the two buildings. Building No. 2, which was

[1] The functions of the Secretary of Agriculture under the Act were transferred to the War Food Administrator by Executive Orders No. 9322, 9334, and 9392 (8 F. R. 3807, 5423, 14783). The administrative ruling in this case was made by an Assistant to the War Food Administrator who acted for the Administrator pursuant to authority delegated (8 F. R. 8087) under the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 516a *et seq.*

not equipped for receiving milk from producers, was operated for manufacturing purposes. (R. 98.)

The two buildings are approximately 50 feet apart and the intervening space is vacant. They are connected by a pipe-line for moving milk between the buildings; a conduit for steam, for heating and power purposes (the steam-producing unit being in Building No. 1); water pipes; and wires for transmitting electricity for lighting and power purposes (there being a single meter to measure the electric power used in both buildings). The office for both buildings and their only telephone are located in Building No. 2, and all of the records relative to the handling of milk or milk products, in either or both buildings, are kept in this building. There is one superintendent for the two buildings. They have only one boiler, which is in Building No. 1. The heat for pasteurizing in Building No. 2, the heat for the preheater in that building, and the hot water which it uses, all come from the boiler in Building No. 1. As operated during the period involved, Building No. 2 was completely dependent upon Building No. 1. (R. 101–102.)

A prior administrative proceeding under Section 8c (15) (A), involving a claim for a market service payment for milk moving from petitioner's Building No. 1 to its Building No. 2 at Webster Crossing during June 1940 culminated in a ruling

in favor of petitioner (R. 91).[2] The Assistant to the War Food Administrator found that such prior proceeding involved a claim for a different period of time and a different record, which, in the light of the present record, was "incomplete", and he rejected the contention that the principle of *res judicata* foreclosed inquiry into the validity of petitioner's claims (R. 103, 111–113).

Petitioner, as authorized by Section 8c (15) (B) of the Act, then filed in the federal district court a bill to review the ruling of the Assistant to the War Food Administrator (R. 22–26). Issue was joined by the filing of an answer (R. 26–29) and the case came before the court on cross motions for summary judgment (R. 2–6). The court, holding that the administrative ruling was in accordance with law, entered a judgment dismissing the complaint (R. 119–124). The Circuit Court of Appeals affirmed this judgment (R. 141).

ARGUMENT

I

Petitioner contends (Pet. 4–5) that the case presents a question which is of vital interest to thousands of milk producers in the State of New York and which affects a large number of handlers similarly situated who have proceedings pending before the Secretary of Agriculture in-

[2] Based on this ruling, petitioner's claim for July 1940 was also paid (R. 12).

volving a sum in excess of $1,000,000. But while the subject of market service payments may be of vital interest to thousands of producers, the decision sought to be reviewed does not question the validity of market service payments as such. The decision deals solely with the propriety of the ruling upon the question whether, on the facts of this case, petitioner's two buildings at Webster Crossing constitute a receiving plant and a separate processing plant or are both parts of a single plant at which petitioner receives and processes milk. The ruling does not rest upon or announce any principle of general application and whenever a like question is presented upon the claim of another handler, it must be decided upon its own particular facts. Furthermore, even if it be assumed that there might be substantially parallel facts in some other case, the determination now in issue can be a precedent only for periods prior to March 1, 1941. Section 927.7 (f), of the milk marketing order, as amended effective March 1, 1941, provides that no market service payments may be made if the manufacturing plant is less than half a mile from the receiving plant (5 F. R. 4971–4972, 6 F. R. 1181).

II

Petitioner's contention (Pet. 10–12) that the Market Administrator had no power to determine whether petitioner's two buildings constitute a

single plant or two plants within the meaning of Section 927.7 (f) of the Order is wholly without merit; indeed, the court below did not even mention this contention. Since the Order permitted the Market Administrator to make a market service payment only if there are two plants, he was obviously empowered to determine whether there were or were not the circumstances which authorize payment. The amendment to the Order effective March 1, 1941, which bars any payment under the Section 927.7 (f) if the receiving plant and manufacturing plant are within half a mile of each other clearly does not indicate that under the prior Order the word "plant" can be construed only as meaning "building". The amendment constitutes a specific restriction upon the right to a diversion allowance and it operates to eliminate controversies, such as that in the present case, as to whether two interconnected buildings in close physical proximity constitute a single receiving and processing plant or separate plants.

Petitioner's contention (Pet. 13–14) that the findings of the War Food Administrator are not supported by substantial evidence is equally without merit. There is no suggestion that there was not substantial evidence to support the Administrator's specific findings and the contention apparently is that the specific findings do not provide substantial support for the finding based thereon that the integrated operations of petitioner at

Webster Crossing made the enterprise one plant. The court below, in disposing of this contention, said (R. 138):

> We can see no practical difference between a building one part of which is used for receiving fluid milk and another for making milk products for the fluid and the two contiguous buildings of the plaintiff which were connected by a pipe line through which the milk was delivered from the first to the second. We think that it was within the province of the War Food Administrator to treat situations so nearly identical as equivalents of one another.

In any event certiorari will not be granted simply to review the evidence and the inferences to be drawn from it (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178), particularly when, as in this case, the administrative finding has been approved by two courts.

III

Petitioner contends (Pet. 12–13) that this Court has never passed upon the application of the doctrine of *res judicata* to administrative determinations in circumstances precisely like those here presented. We submit, however, that even assuming *arguendo* that the Administrator is bound by the doctrine, under accepted principles the prior ruling as to the earlier period would not be *res judicata* in this case.

Petitioner's claim for market service payments for the period beginning in August 1940 is a different claim than that made for the month of June 1940. In suits upon different claims or demands there is estoppel by judgment only if a question upon which recovery of the second demand depends has "under identical circumstances and conditions" been previously concluded by a judgment between the parties. *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, 396. The question of what the evidence showed as to the character of petitioner's two buildings at Webster Crossing was not the same in the two proceedings since there were serious inadequacies in the record in the first proceeding as compared with the later one (R. 112–113). This is not a case, therefore, where, as in *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 626, "all the facts" in evidence in the second proceeding were before the adjudicating body in the former one.

Furthermore, even though the manner in which petitioner's operations may have been conducted in the two periods was "substantially the same * * * they were a completely different set of events, and they were not the set of events litigated in the earlier cases". *Engineer's Club* v. *United States,* 42 F. Supp. 182, 187 (C. Cls.), certiorari denied, 316 U. S. 700. See also to the same effect *Henricksen* v. *Seward,* 135 F. 2d 986 (C.

C. A. 9); *Campana Corp.* v. *Harrison,* 135 F. 2d 334 (C. C. A. 7); *Stoddard* v. *Commissioner,* 141 F. 2d 76 (C. C. A. 2); *Gillespie* v. *Commissioner,* 151 F. 2d 903, 906 (C. C. A. 10). In the *Engineer's Club* case the Court of Claims held that the earlier judgment was not binding in that situation, distinguishing *Tait* v. *Western Maryland Ry. Co., supra,* on the ground that there "the events sought to be tried in the second suit were the identical historical events which had been tried in the first" (42 F. Supp. 188). The *Engineer's Club* unsuccessfully sought to bring the *res judicata* issue before this Court on certiorari, 316 U. S. 700, 317 U. S. 705. There is even less reason to grant the writ here, where the prior order is administrative rather than judicial.

Petitioner does not contend that the decision below is in conflict with any decision of this Court or of another circuit court of appeals. Not only is there no question of conflict but the decision below accords with the holdings of this Court in closely analogous situations. *United States* v. *Stone & Downer Co.,* 274 U. S. 225; *Federal Trade Commission* v. *Raladam Co.,* 316 U. S. 149, 152; *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 253.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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